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No. 09-528

Supreme Court, U.S.
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In The
Supreme Court of the United States

BRIDGEPORT PORT AUTHORITY,
Petitioner,

v.

BRIDGEPORT AND PORT JEFFERSON STEAMBOAT COMPANY, FRANK L. ZAHRADKA, and D&D WHOLESALE FLOWERS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. The Decisions Below Conflict With The Court's Dormant Commerce Clause Jurisprudence Because They Constitute Judicial Rate-Making

Even assuming that *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), still applies to user fees charged by entities such as the Bridgeport Port Authority,[1] the courts below both misconstrued the facts of the case and issued decisions that directly conflict with practices this Court approved.

The Court has consistently recognized that courts "are scarcely equipped to oversee . . . rate structures

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[1] *Evansville* itself no longer applies to fees charged for use of airport facilities. *See* 49 U.S.C. § 1513 and *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 9-10 (1983). Indeed, since *Evansville* was decided, Congress abandoned any reliance upon cost-based regulation in all forms of the transportation industry — preferring instead to allow facilities and service providers in the national transportation system to base their fees on market factors. *See, e.g.*, Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998); Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980); Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980); Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (1978); Ocean Shipping Act of 1978, Pub. L. 95-483, 92 Stat. 1607 (1978); and Railroad Revitalization Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976). Moreover, the Court has recognized that the dormant Commerce Clause does not apply to governmental entities acting as market participants. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807-810 (1976). The inquiry is fact-specific. *See, e.g., Selevan v. New York Thruway Authority*, 584 F.3d 82, 93 (2d Cir. 2009). The courts below, however, did not conduct that inquiry in this case.

and practices." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 (1994). Yet, the district court not only engaged in an examination akin to an audit, it issued an injunction that ensures that the court will remain entangled in deciding questions of whether this activity or that benefits the passengers for the foreseeable future. *See* App. B at 21a-22a. Indeed, the passenger fees that the Port Authority may charge after 2004 remain in limbo to this day because the district court has not decided, and the parties have not agreed upon, the appropriate amount of fees that are "necessary for their [the Port Authority's] expenses that benefit ferry passengers and fairly approximate their use of the Port." App. B at 22a.

This Court's dormant Commerce Clause jurisprudence is not, and has never been interpreted as, an invitation to the lower courts to engage in the kind of judicial rate-making the district court has done here, and must do in the future if the Port Authority is to comply with the injunction. The determination of the proper amount of user fees is essentially a legislative function, not a judicial one. *See, e.g., Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589 (1945). The district court's unwarranted intrusion into the Port Authority's exercise of its rate-making is not only inconsistent with cases such as *Evansville* and *Northwest Airlines*, but also with the entire thrust of national policy as set by Congress over the past thirty years.

Respondents say that *Evansville* involved a "geographically and functionally discrete facility — an airport," while this case involves a "far-flung" port district. Resp. Br. at 9. But this ignores the fact that

the fees at issue in *Evansville* were charged only to a minority of the airport's users — emplaning commercial passengers. *See Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 255 Ind. 436, 441, 265 N.E.2d 27, 30 (1970). And the so-called "discrete" facilities that were funded by the fee included far more than just the portion of the airport used by the commercial airlines themselves. The fee also paid for facilities that commercial passengers never used, such as air freight service counters and facilities, nonscheduled airlines' hanger facilities, office space and waiting areas, fuel storage areas, and airport office space. *See id.*, 255 Ind. at 440, 265 N.E.2d at 29.

More importantly, the decision of the court below contradicts *Evansville* on every significant point.

Evansville identified three factors to consider in determining whether a user fee violates the Commerce Clause: (1) whether it discriminates against interstate commerce; (2) whether it reflects a "fair, if imperfect, approximation of the use of the facilities for whose benefit they are imposed"; and (3) whether the fees are excessive in relation to the costs incurred by the taxing authorities in providing the benefits conferred. *See Evansville*, 405 U.S. at 717-720. *See also Northwest Airlines, Inc. v. County of Kent*, 510 U.S. at 369.

The district court found, and the court of appeals agreed, that the fee did not discriminate against interstate commerce. *See* App. C at 56a; App. A at 14a. The basis of the fee was the passengers' use of the Port Authority's facilities — the dock, the terminal, the parking lot, and the access road.

The gravamen of respondents' claim was that the fees were excessive in relation to the Port Authority's costs of providing benefits to the passengers. The district court included in the benefits provided to the passengers only that part of the passenger fees that was spent directly on the dock and related facilities. Respondents say that the district court did not ignore the grants used to pay for substantial improvements to the dock and terminal facilities because it mentioned them in its opinion. Resp. Br. at 12. But the point is not whether the opinion acknowledged the existence of the grants, but whether it should have taken into account *all* of the benefits conferred on the passengers by the Port Authority in determining whether the fees fairly approximated those benefits.

Over the entire 12 years since the fee was imposed to the date of trial, the Port Authority's net income from the ferry operations (including the passenger fees, the lease of the dock, and other miscellaneous fees) was $10,067,157 versus expenses for all activities in the entire district of $9,858,904 — an excess of about $200,000. In each of the last three years covered by the lawsuit (2002-2004), the Port Authority's expenses exceeded the net income it received from the ferry operations, with the total expenses exceeding the total ferry income over that period by about $600,000. App. C at 32a-33a.

These calculations did not take into account that the Port Authority obtained $14,000,000 in grants to improve the dock, the terminal, and related facilities. Although the passengers and the ferry company were the principal beneficiaries of the grants, they paid nothing for them. Had the passengers been required to pay for these improvements, the fees would have been

more than 50% higher. No one disputes that. Respondents wrongly accuse the Port Authority of arguing that it can recoup the value of the grants from the ferry passengers. That is not the case.

The issue before the Court is not whether the Port Authority can recoup this amount, but rather whether the courts should consider all benefits conferred on the user when considering whether the fee is a fair approximation of the use of the facilities.

The Port Authority's total expenditures for the entire period from 1993 to 2004 were more than $23,000,000, of which more than $18,000,000 directly benefited the passengers. Yet the passengers actually paid only about 25% of the costs incurred by the Port Authority in providing the benefits conferred on them. By any standard, charging the passengers 25% of the cost of the benefits enjoyed by them (with the remaining 75% paid by the taxpayers) is a "fair approximation" of the use the passengers made of the facilities. The passenger fees were not excessive viewed in this light.

Respondents also suggest that 15% of the fees were improperly paid into the City of Bridgeport's coffers. Resp. Br. at 6-7. But this figure represents a contractual obligation the Port Authority owes the City under the parties' 1993 Property Management Agreement. App. C at 34a-35a. Even if this percentage was allocated to general revenue, it would not rise to the level of a constitutional violation. In the New Hampshire case (also decided in *Evansville*), the municipalities deposited 50% of the fees into unrestricted general revenue accounts without

offending the Constitution. *See Evansville*, 405 U.S. at 720.

Finally, respondents quarrel with petitioner's contention that the district court improperly went beyond the "fair approximation" analysis. When the district court concerns itself with whether some few dollars out of the millions collected since 1993 were spent on baseball tickets or personal long-distance telephone calls, it has crossed the line from assessing whether the Port Authority's fees were a "fair approximation" of its costs to micro-management.

II. The Decisions Below Conflict With The Court's Tonnage Clause Jurisprudence Because The Tonnage Clause Applies Only To Duties Levied On Vessels Or Their Owners, Not To Fees Paid By Passengers

The lower courts based their Tonnage Clause rulings on two false premises: that the Port Authority charged the passenger fees to the ferry company or its vessels, and that the Tonnage Clause applies to passengers, as well as vessels.

The record is clear that the ferry company did not pay the passenger fees. Rather, it collected the fees, and (after keeping a portion for administrative expenses) remitted them to the Port Authority. App. C at 30a. Theoretical damages resulting from a theoretical decrease in passengers do not establish a Tonnage Clause violation. (In fact, the evidence showed that there was an increase in passengers after the fees were imposed.) The only recoverable damages for a Tonnage Clause violation are measured by the excess of the duties charged to the vessel over the

benefits conferred upon it. The ferry company was charged nothing, and thus it had no standing to raise a Tonnage Clause complaint. And, of course, the passengers are not the vessel owners — so they had no standing to raise a Tonnage Clause claim either.

The Constitution prohibits a State "without the Consent of Congress, [to] lay any Duty of Tonnage." U.S. CONST. art. I, § 10, cl. 3. The Tonnage Clause protects maritime *vessels* from improper taxation by seaboard States by prohibiting States from imposing taxes or fees upon vessels unless the States have some rational basis for the tax or fee apart from the mere privilege of using the States' ports. *Huse v. Glover*, 119 U.S. 543, 550 (1886).

Historically, the words "Duty of Tonnage" referred to "'a duty' imposed upon a ship, which duty vari[ed] according to 'the internal cubic capacity of a vessel,' *i.e.*, its tons of carrying capacity." *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2281-82 (2009) (*citing Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265 (1935)) (additional internal citations omitted). Following that definition, this Court's early cases interpreted the Tonnage Clause as a prohibition on "a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country." *Huse*, 119 U.S. at 549-50. As confirmed recently in *Polar Tankers*, the Tonnage Clause prohibits "any duty *on the ship*[,]" *id.* at 2283 (*quoting Steamship Co. v. Portwardens*, 73 U.S. 31, 35 (1867)) (emphasis added), whether or not that duty is calculated according to the ship's capacity or tonnage, if that duty is imposed for the privilege of the ship's entrance or exit from the port.

Even under the broadest reading of the Tonnage Clause, it prohibits only those taxes, fees, or duties imposed *upon a ship* as an instrument of commerce. The Court has never applied the Tonnage Clause to anything but a charge *on a vessel or vessel owner*.[2]

Here, the Port Authority imposes the passenger fee on passengers who travel to and from the Water Street Dock and who take advantage of, or have the ability to take advantage of, the Port Authority's facilities. The Port Authority *does not* impose the passenger fee on vessels or vessel owners, *i.e.*, the ferry boats and the ferry company, and therefore, the passenger fee does not meet the definition of a "duty of tonnage" as

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[2] In the representative cases cited in *Polar Tankers*, the challenged tax, fee, or duty was imposed on the vessel or the vessel owner, not on the cargo or the vessel's passengers. *See Inman S.S. Co. v. Tinker*, 94 U.S. 238 (1876) (invalidating fees imposed on ships of a certain capacity in the harbor of New York); *Cannon v. New Orleans*, 87 U.S. 577 (1874) (invalidating tax upon every vessel that stopped, either by landing or mooring, in the Mississippi River at New Orleans, for the privilege of so landing or mooring); *Steamship Co.*, 73 U.S. 31 (invalidating tax imposed on every ship that entered the Port of New Orleans); *see also Clyde Mallory Lines*, 296 U.S. 261 (challenge to harbor fee imposed upon vessels 500 tons and over to pay for policing of the harbor); *Packet Co. v. St. Louis*, 100 U.S. 423 (1879) (challenge to wharfage dues imposed upon vessels). And in other cases, the Tonnage Clause has been asserted only as a bar to taxes, fees, and duties imposed on vessels or vessel owners. *See, e.g., Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157 (D. Haw. 2001) (challenge to ocean recreation management fee and use fee imposed upon vessels); *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 690 F. Supp. 1515 (E.D. La. 1988), *aff'd*, 874 F.2d 1018 (5th Cir.), *amended*, 891 F.2d 1153 (5th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (challenge to port and harbor dues imposed upon vessels).

intended by the Framers and as prohibited by the Tonnage Clause. Given that the Court has never interpreted the Tonnage Clause as prohibiting fees charged to *passengers* of vessels, it should not permit the lower courts to interpret the Clause in this manner. The Clause simply does not reach fees or duties imposed upon passengers.

The Court consistently has interpreted the Tonnage Clause "in light of its purpose, a purpose that mirrors the intent of other constitutional provisions." *Polar Tankers*, 129 S. Ct. at 2282. As this Court recognized in *Polar Tankers*, the Tonnage Clause has, as one purpose, the restraint of the States from exercising their taxing powers to the detriment of their sister States. *Id.* (internal citation omitted). The Tonnage Clause prevents the States from evading the prohibition on laying duties on imports and exports by taxing the vessels carrying those imports and exports. *See id.*; *Steamship Co.*, 73 U.S. at 34-35:

> In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage.

The Tonnage Clause acts as a corollary to the constitutional grant to Congress of the power to regulate interstate and foreign commerce. Samuel Freeman Miller, *Lectures on the Constitution of the United States* 593-94 (1893):

> But it may now be taken to be the settled doctrine of the Supreme Court that only a tax which may be said to be laid for the privilege of a vessel to enter a port can be held to be a tonnage tax. The prohibition against the States' levying a duty of tonnage is intended to prevent any interference with commerce with foreign nations or between one State and another, and is not intended to prevent a rightful assessment to secure a compensation for services rendered to vessels using the waters of a State, such as wharfage and the like.

The passenger fee offends none of the policies that the Framers intended the Tonnage Clause to protect. By charging the passenger fee to passengers riding the ferry, the Port Authority is not indirectly taxing a commodity that it could not tax directly under the Import-Export Clause.[3] And the passenger fee does not inhibit the commerce of passengers riding the ferry company's ferries to and from Bridgeport, Connecticut and Port Jefferson, New York. In fact, as the district court noted, the ferry company did not present any evidence that the inclusion of the passenger fee in the price of the ferry ticket led to a decrease in demand for the ferry company's services or in the ferry company's ridership. App. C at 47a. Instead, the court found that

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[3] U.S. CONST. art. I, § 10, cl. 2.

the ferry's ridership rose steadily for the entire period after the Port Authority first instituted the passenger fee. *Id.* at 48a.

The Tonnage Clause must be interpreted to effectuate the intent of the Framers and not go beyond that intent. Yet the lower courts in the decisions below have done just that. Their interpretation of the Tonnage Clause exceeds permissible bounds and ignores the Clause's intent and purpose.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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